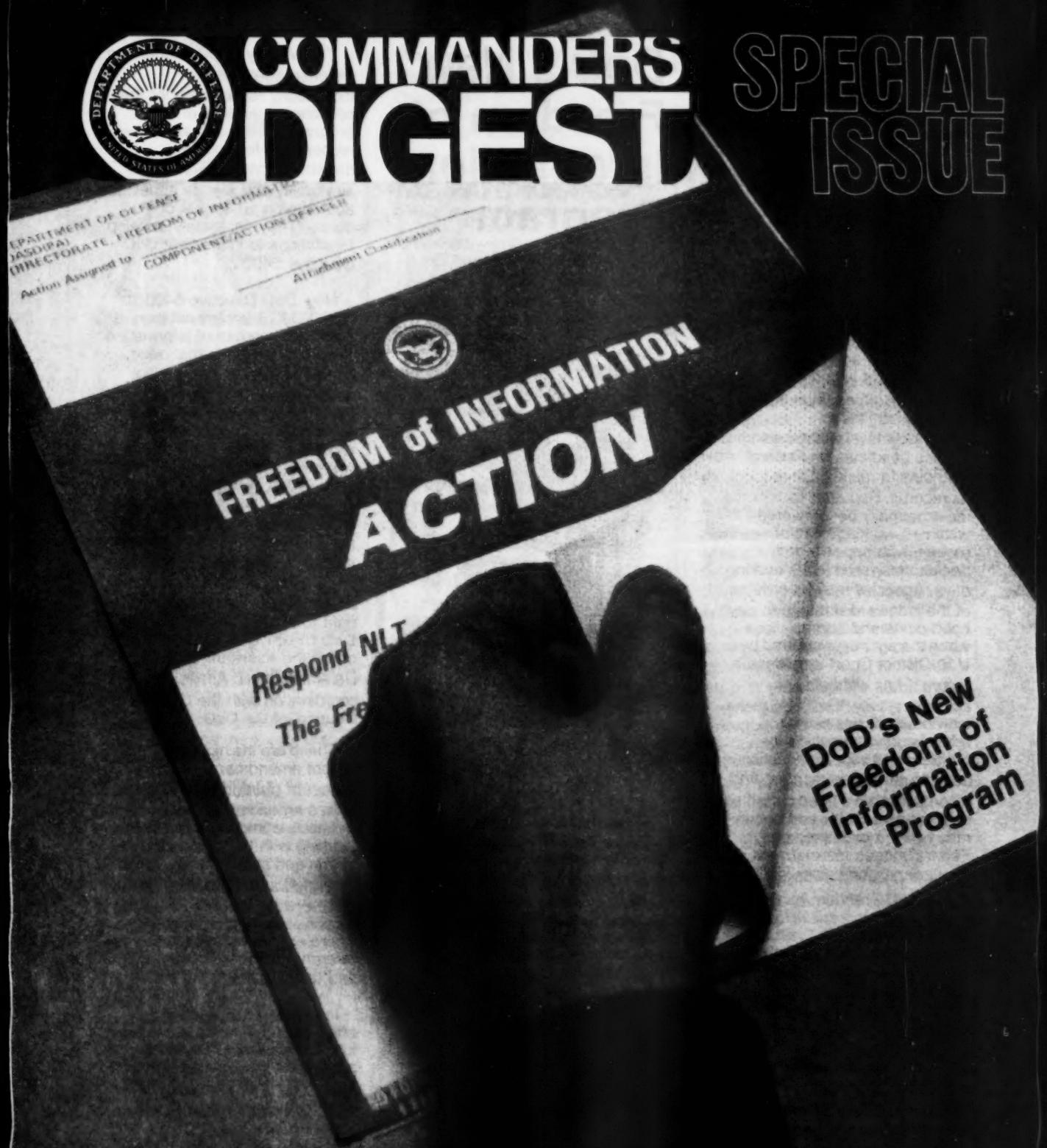
COMMANDERS DIGEST

SPECIAL ISSUE



DoD's New Freedom of Information Program

VOL. 17, NO. 3/February 14, 1975

DoD's New Freedom of Information Program

All components of the Department of Defense are poised to implement the new DoD Freedom of Information Program. This program embraces policies that will strike a better balance between the public's right to know about government and the government's obligation to protect the public. The program was instituted to meet new requirements growing out of amendments to the Freedom of Information Act (FOIA), or, more precisely, Title 5, Section 552, U.S. Code as amended by Public Law 93-502. The amended Act becomes law on February 19, 1975.

The new law establishes precise deadlines on Federal agencies to respond to request for records. Requests for records must normally be answered within 10 working days of receipt, with appeals from denials answered in 20 working days. Agencies may be ordered, at the judge's discretion, to pay court costs and attorney fees when the agency is ordered by a U.S. District Court to release a record it has withheld administratively. It will also make individual officials liable for administrative penalties for arbitrary and capricious action in denying requested records. And, records that have been classified by Executive Order and statute may now be examined by Federal judges to determine if they are properly classified.

The DoD Freedom of Information Program will be directed and administered by the Assistant Secretary of Defense (Public Affairs) who will be assisted in his Department-wide role by a Deputy Assistant Secretary of Defense (Public Affairs) and a Director, Freedom of Information. Overall DoD Freedom of Information Program authorities, responsibilities and procedures are set forth in revised DoD Directive 5400.7, "Availability to the Public of DoD Information." This directive will be effective February 19.

Public Law 93-502
93rd Congress, H. R. 12471
November 21, 1974

An Act

The Assistant Secretary of Defense (Comptroller) will serve as focal point for inserting some material in the Federal Register and for compiling the various indexes of documents required by the Freedom of Information Act amendments.

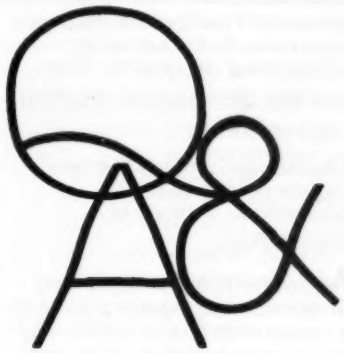
When litigation is likely, the Department of Defense General Counsel will insure coordination with the Department of Justice on all final denials of appeals for requests for records.

The Military Departments and Defense agencies are individually responsible for the operational aspects of the program. They each are responsible for original determination of a record's availability and are the appellate authority on an appeal of a denial. They separately develop regulations to implement DoD Directive 5400.7.

New DoD Directive 5400.10, "OSD/OJCS Implementation of the DoD Freedom of Information Program" provides that each component head is the initial denial authority. They make the initial determination as to the availability of information requested by the public. In the event of denial, they must cite and explain the specific exemption (such as in the case of highly classified National Defense documents), set forth the names and titles or positions of persons responsible for the denial of such requests, and the right to appeal. Appeals under DoD Directive 5400.10 are acted on by the Assistant Secretary of Defense (Public Affairs) in close coordination with the General Counsel of the DoD.

These are the highlights of the recent amendments to the Freedom of Information Act. These amendments are by definition complex, and officials working with the law should obtain and study the new law as amended and the revised DoD and Service Directives outlining responsibilities and functions. There can be no substitution for referring to source documents and understanding them.

In order to help further the effort of understanding this new law, *Commanders Digest* is presenting in Question and Answer format a brief explanation of the new Freedom of Information law.



Question—What is the Congressional intent behind the Freedom of Information Law?

Answer—When first drafting legislation in 1965, Congress cited these words of former President James Madison, who wrote the First Amendment to the U.S. Constitution, to explain this basic point of American law: "Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or means of acquiring it is but a prologue to a farce or a tragedy or perhaps both."

Question—Does this imply that Congress wants the Executive Branch to reveal all?

Answer—No! Although full disclosure of all information may appear to some to be the desire, Congress recognized that the successful operation of the Government and the protection of individual rights require the withholding from the public of certain types of information. Therefore, the Congress specifically exempted nine categories of information from mandatory release.

Question—Exactly how does the Department of Defense stand on this basic issue?

Answer—DoD Directive 5400.7 states it is the policy of the Department of Defense to make the maximum amount of information available to the public, consistent with other obligations to the public in the fulfillment of the Department's official responsibilities.

Question—Let's examine the 10-day deadline required by the new law. Wouldn't it be difficult to process a request in and process it out in such a short time frame?

Answer—Well, the 10 days start on the receipt of a request which complies with the published procedures by the designated addressee. And it's 10 *working* days, so Saturdays, Sundays, and legal holidays aren't counted. In essence, the agency designee making the initial determination has 10 days to notify the individual whether his request will be honored or refused. Should the determination be adverse, the requester should be notified of his right to appeal to the head of the agency which may be the Office of Secretary of Defense or the Secretaries of the Military Services.

Question—What's the 20-day deadline?

Answer—This has to do with appeals. The head of the agency must make a determination with respect to any appeal within 20 working days after the appeal is received. Again in the case of an adverse determination, in whole or in part, the agency has the obligation to notify the requester of the provisions for judicial review.

Question—Aren't these deadlines too tight for some of the complicated cases?

Answer—The new law does indeed anticipate the need for an extension of time under "unusual circumstances." But "unusual circumstances" is defined in three ways: (1) the need to search for and collect requested records from the field or other activities separate from the office; (2) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records; (3) the need to consult with another agency having a substantial interest in the determination of the request or having substantial subject matter interest. But in any event, the time extension under "unusual circumstances" is limited to 10 working days.

Question—Where does the 30-day deadline come in?

Answer—This is a matter of simple arithmetic—10 working days to make the determination, 20 working days to handle an appeal. Under "unusual circumstances" there might be another 10 days, thus in some cases total time might run to 40 working days. But the point is that, once the 10-day determination deadline, the 20-day appeal deadline, and possibly the 10-day extension for unusual circumstances have been met, the requester may resort to court action. However, should the agency fail to respond to the request within the 10 working days allowed for initial determination unless extension for "unusual circumstances" is involved, the requester may seek judicial relief at that time.

Question—When a Government agency receives a request for information on a specific subject, exactly how many days does the agency have to provide the information

to the requester after it decides to do so?

Answer—The law does not spell out the number of days. It says the agency will make the information "promptly available."

Question—What are the exemptions from mandatory release of information?

Answer—Congress established nine. In short form they are: Exemption 1, "specifically authorized under criteria established by Executive Order to be kept secret in the *interest of National defense* or foreign policy and are in fact properly classified pursuant to such Executive Order"; Exemption 2, "related solely to the *internal personnel rules* and practices of an agency"; Exemption 3, "specifically exempted from disclosure by statute"; Exemption 4, "*trade secrets* and commercial financial information obtained from a person and privileged or confidential"; Exemption 5, "*inter-agency or intra-agency memorandums* or letters which would not be available by law to a party other than an agency in litigation with the agency"; Exemption 6, "*personnel and medical files* and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"; Exemption 7, "*investigatory records* compiled for law enforcement purposes, but only to the extent that the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute an unwarranted invasion of personal privacy, disclose the identity of a *confidential source,* and in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, disclose investigative techniques and procedures, or endanger the life or physical safety of law enforcement personnel"; Exemption 8, "contained in or related to examination, operating, or *condition reports* prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions"; and Exemption 9, "*geological and geophysical information* and data, including maps."

The 1974 amendments made changes in Exemption 1 and 7 above and establish additional requirements for releasing unclassified documents. The new law also imposes reporting requirements.

Question—What is the new requirement to release unclassified portions of documents?

Answer—The law says, "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions

which are exempted." Without getting into fine points of the law, such as defining "reasonably," it means that documents which contain some classified or otherwise exempt information are not totally exempted. The non-exempt parts are like totally unclassified information to be put on request in the public domain. And this implies, of course, work on our part to delete the exempt parts of the documents.

Question—What are the new reporting requirements the law mentions?

Answer—The new law deals in specifics. Here is what the DoD must report annually: *(1)* the number of determinations made by such agency not to comply with requests made to such agency and the reasons for such determination; *(2)* the number of appeals made by persons, the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; *(3)* the names and titles or positions of each personal responsible for the denial of records requested under this section, and the number of instances of participation for each; *(4)* the result of Civil Service Commission proceedings initiated to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for improperly withholding requested records, including a report of the disciplinary action taken against the officer or employee or an explanation of why disciplinary action was not taken; *(5)* a copy of every rule made by such agency regarding the FOIA; *(6)* a copy of the fee schedule and the total amount of fees collected by the agency for making records available under the FOIA; and *(7)* such other information as indicates effort to fully administer the law.

DoD Directive 5400.7 fixes responsibility for the annual report to Congress with the ASD (PA). Components will submit their reports to Public Affairs, where they will be merged into one report. A system is being devised whereby standard information formats will be made available to all components to assist in maintaining standard information data bits compatible with computers.

In order to properly advise the Congress the extent to which DoD money and people are being used to meet this

amended Act, and to seek additional appropriations, standard data must be maintained by all components.

Question—Is this the total reporting requirement?

Answer—That was only the reporting obligation of the Department of Defense and other executive agencies, including of course, the three Military Departments which are regarded as agencies under the new law. The Attorney General must also make a report to Congress in the same annual March 1 time-frame. He must submit a listing of the number of cases arising under the law, the exemption involved in each case, the disposition of the cases, and the cost, fees, and penalties assessed. This report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with the FOIA.

Question—Doesn't this represent substantial changes which in turn will change DoD procedures?

Answer—We have only touched on some of the changes, specifically, the changes to the exemptions, the provision to provide non-exempt portions of documents, and new reporting procedures. We have yet to address the new obligations the Executive Branch has to persons requesting information.

Question—What obligations are these?

Answer—For example, all government agencies since 1966 have had an obligation to publish information, documents and other material in the *Federal Register* for guidance of the public. Now each agency must promptly publish, quarterly or more frequently, and distribute, (by sale or otherwise) copies of each index or supplement thereto unless it determines by order published in the *Federal Register* that the publication would be unnecessary and impracticable, in which case, the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of publication.

Question—Doesn't this entail an enormous amount of time, effort and money?

Answer—Let's first address the effort. Federal agencies already are publishing material in the *Federal Register*. Agencies already have established rules for public inspection and copying of documents. Taken together it means there is a lot of information now available to the public. In the *Federal Register* for example, agencies describe their central and field organizations and detail the methods by which the public may obtain information about the agency. This includes rules of procedures, descriptions of forms available, or the places where forms may be obtained. It also entails statements of the general course and method by which agency functions are channeled and determined. There are other stipulations, but the *Federal Register* contains a vast amount of material available to the public. Now, in cases where materials are not published routinely in the *Federal Register,* each agency has long established published procedures for public inspection. This involves such things as final opinions, including concurring and dissenting opinions, statements of policy and interpretation, and administrative staff manuals and staff

instructions that affect the public; all of which must be indexed. Thus, we are already expending considerable time and effort.

Question—How about the money, the costs of this program, both to the Government and to individual requesters?

Answer—Agencies are required to publish a uniform schedule of fees. This schedule must apply equally to all units of the agency. Fees must be limited to a reasonable standard for document search and duplication. Fees must provide for recovery of only the direct costs of search and duplication. Documents can be provided without charge or at reduced charges when the agency determines that providing the information primarily benefits the general public. Thus, policy is that fees are held to direct cost, or may even be free or at reduced cost. Now this presumes the Government must absorb the indirect costs which must be recovered by appropriations.

Question—Is it true that an individual denied information from the Federal agency may take the agency to court to obtain it?

Answer—The law allows the complainant to file in a U.S. District Court, the place where the complainant resides or has his principal place of business, or in the District of Columbia. In such cases, the court will determine the matter "de novo," in other words, afresh or without a presumption that the agency's action was valid. It may examine the agency records "in camera" or privately in chamber, to determine whether such information or part of it may be withheld. *However, the burden of proof will be on the agency to sustain its denial.* This means that officials who maintain that a record is exempt because it is classified, for example, must be ready to demonstrate to the court the basis for that conclusion, which the court may refuse to accept.

Question—Do the amendments address the possibility of prolonged delays in the judicial process, which might render the requested information useless if and when finally obtained?

Answer—Yes, there are two provisions addressed to this problem. First, the defendant, or the Government, must provide an answer or plead within 30 days rather than the usual 60 days, unless the court otherwise directs. Second, the law allows the court, at its discretion, to give precedence on the docket over all cases at the earliest practicable date and expedited in every way.

Question—Does this imply the Government may be liable for litigation costs as would any defendant?

Answer—Yes, the new law states that the court may assess against the United States reasonable attorney fees and litigation costs incurred in which the complainant has substantially prevailed.

Question—What is the liability of Government officials who function, after all, as agents of the Government?

Answer—The new law provides for personal liability in two instances: (1) contempt actions, as in any court proceeding; (2) possible disciplinary action resulting from a Civil Service Commission proceeding. Here is the exact language of the law: "Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends."

Here is the language of the second instance of personal liability: "In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member."

Question—Who are these "responsible officials"—the people whose names will be listed as turning down requests for information?

Answer—In a way, here the law is discretionary. It makes executive agencies responsible, and specifically defines the three Military Departments as executive agencies, in addition to the Department of Defense. Ultimate authority in the Department of Defense is, of

course, the Secretary of Defense. Similarly, in the Military Departments it would be the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force. Obviously, it would be impossible for these high officials to function in their jobs, if they had to make every decision concerning release or denial of information.

Now the Department of Defense already has named in Directive 5400.7 that Assistant Secretary of Defense (Public Affairs) is the DoD-wide Freedom of Information Program director and administrator. Directive 5400.10 also assigns responsibilities to Secretary of Defense (OSD) and Organization of the Joint Staff (OJCS) components.

It will be the head of the OSD component who will make the initial determination of denial of information requested of the Department of Defense . It will be his duty to set forth the names and titles of each person responsible for denial of such requests. As a rule of thumb, you may assume that officials with control of a policy or activity—officials we now go to in staffing procedures—will be the officials who will be listed as responsible.

Question—If we boil it down to the practicality of avoiding an adverse court decision, may we assume the best action is to be perfectly sure of grounds for any denial of information?

Answer—Both the Government and the Government official can find themselves in court, if they fail to meet deadlines. The new law allows the individual requesting information to go to court, when his administrative remedies have been exhausted. And these administrative remedies are spelled out specifically in terms of deadlines, 10 and 20 days.

Question—A point not yet covered—who are the requesters?

Answer—The law directs the agencies to make non-exempt requested records available "to any person." The seven previous years have shown that the bulk of requests have not come from individuals or news media but came instead from business firms. The object of most requests were documents, not answers to press queries.

Question—Do you expect an administrative and judicial nightmare?

Answer—This would be a matter of speculation. We feel that procedures established by DoD Directives 5400.7 and 5400.10 are adequate; that individual commanders will understand our new obligations and promptly meet deadlines; that we will avoid many pitfalls. After all, the executive branch exists to execute the laws of the land, and the new Freedom of Information Act is the law of the land. It is logical to assume that the legislative branch would promptly write relief legislation if this becomes necessary. We should not leap to the assumption that the American people will rush into court actions just because new avenues are open to them. In short, wait-and-see appears to be the best attitude. We should trust that Americans in and out of Government have the good sense and personal integrity to make the law work as it was intended.

Question—The Privacy Act of 1974, which safeguards individual privacy from the misuse of Federal records by providing individual access to those records, was recently passed by Congress. Is this new law directly related to the FOIA, and does it conflict with the FOIA?

Answer—No. The Privacy Act of 1974 is another Congressional guarantee that an important right of individuals in a democratic society will not be abused. The two laws do not conflict in that they were designed for quite different, but valuable purposes. We will look closely at the new Privacy Act, however, for possible conflicts when it becomes law on September 27 of this year.

Question—To what extent does the new Freedom of Information Act impact directly upon the different Services?

Answer—The Services will be required to establish procedures and organizations which can be responsive to the needs of persons seeking certain categories of information from them. In most cases the Services will resolve any conflicts in information requests at their level—rather than moving the request to the Department of Defense.

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